

**-FILED-**

JUN 03 2021

U.S.

At  
ROBERT H. THROCKMORTON, Clerk  
U.S. DISTRICT COURT  
NORTH DISTRICT OF INDIANA

Case No.

V.

2:19-CR-0140

Michael Christianson

## Defendant's Proposed Jury Instructions

Defendant, pro se, pursuant to FRCP Rule 2 and 30(a) submits his proposed jury instructions. Whenever possible, the Defendant used the 7<sup>th</sup> Circuit Pattern Instructions (ND Ind. Local Rule 30-1(b)) by number only (30-1(c)):

A. Knowingly / Knowledge

Knowledge means that Mr. Christianson, at the time<sup>1</sup> of transporting the pictures, realized what he was doing and was aware of a high probability that at least one picture involved an actual person under the age of eighteen years engaged in sexually explicit conduct. Mr. Christianson did not act knowingly if, at the time<sup>1</sup> of transporting the pictures he actually be-

lieved the pictures to be fake child pornography and/or adult actors pretending to be minors and/or legal child pornography, or if Mr. Christenson acted by mistake, accident, or other innocent reason.<sup>2</sup>

1. U.S. v. Silva, 794 F.3d 173, \_\_\_\_ (1 Cir 2015) ("government [must] prove... material... described in each count in fact [meets] the statutory definition for child pornography, and that [he] knew 'the facts that made his conduct fit the definition of the offense' AT THE TIME OF receipt") (citing to *Elonis v. U.S.*, 135 S.Ct. 2001, 2009 (2015) (quoting *Staples v. U.S.*, 511 U.S. 600, 608 n.3 (1994)); *U.S. v. Dillingham*, 320 F.Supp.3d 809 (E.D. VA, May 29, 2018) (Rule 29 Motion) (No direct evidence that defendant actually knew that the charged material contained child pornography at the time of its distribution or receipt); *U.S. v. Rodriguez*, No. 18-0356-CG (C.A.A.F. 2019) (Justice law)
2. U.S. v. Jewell, 532 F.2d 697, 706-707 (9 Cir 1976) (Explaining knowledge is established if a person is aware of a high probability of the facts existence, unless he "actually believes that

it does not exist". Knowledge is a matter of Subjective — not objective — belief [Citations omitted]; *U.S. v. Simpson*, 561 F.2d 53, 62 (7 Cir 1977) ("Knowingly" in a criminal action is to insure that no one would be convicted by an act done because of mistake or inadvertance or other innocent reason." (Citing to *Ryan v. U.S.*, 314 F.2d 306, 310-11 (10 Cir 1963); *Tallman v. U.S.*, 465 F.2d 282, 287-88 (7 Cir 1972)); *Jewell*, 532 F.2d at 707 (the defendant's "Subjective belief" is the determinative factor" what he "actually believed." Failure to clarify this in an instruction "may allow a jury to convict on an objective theory of knowledge."); accord *U.S. v. Bright*, 517 F.2d 584, 586-89 (2d Cir 1975); *Morrisett v. U.S.*, 342 U.S. 246, 271, 276 (1952) (holding a defendant could not be found guilty if he truly believed the shell casings, on U.S. property, ~~to~~ he collected and sold to be abandoned); *Elonis v. U.S.*, 135 S.Ct. 2001, 2012 (2015); *Rosen v. U.S.*, 161 U.S. 29 (1896); *U.S. v. Lieu*, 963 F.3d 122 (D.C Cir 2020) ("the defendant's state of mind should be assessed 'according to the circumstances as he believed them to be, rather than the circum-

Stances as they may have existed in fact")

## B. Circumstantial Evidence

Mr. Christianson's Knowledge, his belief, and intent — the state of his mind — will be provable by Circumstantial evidence,<sup>1</sup> Such as his words and Conduct, from which, in ordinary human experience, mental Condition may be inferred.<sup>2</sup> But remember, Mr. Christianson's State of mind must be assessed according to the Circumstances as he believed them to be, rather than the Circumstances as they may have existed in fact.<sup>3</sup>

1 American Commu Ass'n v. Douds, 339 U.S. 382, 411 (1950) ("Juries everyday pass upon Knowledge, belief, and intent — the state of men's minds — having before them no more than evidence of their words, and Conduct, from which, in ordinary, human experience, mental Condition may be inferred. ").

2. U.S. v. Santos, 553 U.S. 507, 521 (2008) (In Criminal trials, a defendant's Knowledge "will

be provable (as Knowledge must almost always be proved) by Circumstantial evidence");  
Pigee v. Isreal, 670 F.2d 690, 692 (7 Cir 1982)  
("State of mind (i.e., intent, mental purpose, Knowledge) must be determined Circumstantially, by inference")

3. U.S. v. Liew, 963 F.3d 122 (D.C. Cir 2020) ("The defendant's State of mind should be assessed according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact")

### C. Subjective Reaction To Images Not Relevant is not Relevant

You are not to decide whether one or more pictures appealed, or were intended to appeal, to Mr. Christianson's Sexual interests, only whether, & if any, depict an actual minor engaging in sexually explicit Conduct.



## D. Hard Core Pornography or Obscenity Per Se is

Hard Core pornography or Obscenity is obscenity which focuses predominately upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose or justification. There is no desire to portray it in pseudoscientific or "arty" terms. It can be recognized by the insult it offers, invariably, to sex and society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any serious value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose [is] to stimulate erotic response.... No proof, other than the viewing of it, is required to determine if it is, in fact, obscene.

Morris v. Price, 259 A.2d 337, 341 (D.C. App. 1969)  
(Adopting as statement of Hard Core Porn/Obscenity per se)



## Determining Guilt and Innocence Burdens of the law placed on each Party

In determining the guilt or innocence of ~~each~~ the defendant, you should scrutinize the evidence with the utmost care and caution, bringing to that duty all of the reason and prudence which you would exercise in the most important affairs of life, in fact, all of the judgment, care, caution and discrimination that you possess, and if after such scrutiny of all of the evidence you entertain a reasonable doubt as to the defendant's guilt, you must acquit him.

The burden of proving Mr. Christianson guilty of the crimes charged is upon the government, and before you can render a verdict of guilty the government must prove to your satisfaction, beyond a reasonable doubt, that the defendant is guilty of the crimes charged, and of every element thereof, and if you can reconcile the evidence upon any reasonable



hypothesis Consistent with Mr. Christiansen's Innocence, you must do so and acquit him.

One of the basic principles of our System of justice is that every man is presumed to be innocent until proven guilty beyond a reasonable ~~guilt~~ doubt. The defendant in every Criminal action is entitled to the full benefit of the presumption of innocence at the outset of the trial, and such presumption of innocence abides with him throughout the trial of the case and must prevail on your verdicts, unless the evidence convinces you of his guilt beyond all reasonable doubt.

In Considering the evidence in a Criminal Case, you must look to this evidence and view it in the light of that presumption of innocence. Mr. Christiansen is not required to prove himself innocent. The burden of proof never shifts to the defendant but rests on the prosecution throughout the trial. The burden of

proof is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he has been indicted. The burden of proof is on the prosecution to convince you by the presentation of credible evidence of his guilt beyond all reasonable doubt.

Ford v. Israel, 534 F.Supp. 1128, 1131 (W.D.Wis 1982);  
 Pigeon v. Israel, 700 F.2d 1096 (7 Cir 1983);  
 Davis v. U.S., 160 U.S. 469, — (1895)

G

## Advocating

Mr. Christianson has a First Amendment right to advocate for Naked-play, even if ~~year~~ it would be illegal in some locations but not others.<sup>1</sup>

One of the things that separates our society from totalitarian governments is Mr. Christianson's absolute right to propagate opinions that the government finds wrong or even harmful to minors.<sup>2</sup>

<sup>1</sup> *Morse v. Frederick*, 551 U.S. 393, 435 (2007);  
*Brandenburg v. Ohio*, 395 U.S. 444, 447-448 (1969)  
("the Constitutional guarantees of free speech" permits "the advocacy of" "law violation")

<sup>2</sup> *American Booksellers v. Hudnut*, 771 F.2d 323, 328 (7 Cir 1985)

The right to educate one's children in sexual matters is protected by the First Amendment.

*Pierce v. Society of Sisters*, 268 U.S. 510 ( )

## H. Protective Order

An acquittal in this case does not mean that Mr. Christianson will retain ownership or possession of the visual depictions or the children's books. The defendant has entered into a binding protective order with the United States government that guarantees the three books and all visual depictions used in this case will be impounded and forfeited upon conviction or acquittal.

## I. Age of Subjects

The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the transporter, Mr. Christiansen.

*U.S. v. X-Citement Video*, 513 U.S. \_\_\_, 72 n.2 (1993)

## J.

Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo, a visual depiction does not become child pornography because it is placed in the hands of a pedophile, or it is placed in a book where pedophiles might enjoy it or use it to violate the law.

*U.S. v. Villard*, 885 F.2d 117, 122 (3rd Cir 1989) (Focus of the image must be on the intended effect, rather than on the actual effect on the viewer) (§2252(a)(1) case); *U.S. v. Miller*, 829 F.3d 519, 526 n.3 (7th Cir 2016) (citing to Villard, *Id*

and holding that "the subjective intent of the viewer cannot be the only consideration in finding of lasciviousness"); U.S. v. Steen, 634 F.3d 822, 829 (5 Cir 2011) "Congress did not make [transportation] of Child pornography turn on whether the maker [transporter,] or viewer of an image was sexually aroused" and consideration of arousal is an improper "non-statutory element")

## K Lascivious Exhibition

In order to determine whether a visual depiction is a lascivious exhibition of the anus, genitals, or pubic area, you must consider the overall content, character and setting of the visual depiction, while taking into account its social and cultural context.<sup>1</sup>

The term "lascivious exhibition" means a depiction that is sexual in nature.<sup>2</sup> If not, it is not illegal under the law because it is not lascivious.<sup>3</sup>

A boy or a girl has a right to be exhibited or to pose in a state of nudity.<sup>4</sup> And the striking aspects of nakedness and youth are not enough alone to render a visual depiction lascivious.<sup>5</sup> Therefore, when you are determining whether a visual depiction, if any, is or is not a lascivious exhibition of an actual person's anus, pubic area or genitals the distinction between body areas and specific body parts is not legally significant: the crucial question is whether the depiction of the anus, pubic



area or genitals is lascivious, not whether the camera happens to focus on the genitals or the buttocks or some other body area.<sup>6</sup>

The law requires a visual depiction ~~have~~ have more than a suggestion of lasciviousness.

The law requires any lasciviousness to be explicit, that is if there is lasciviousness present it must actually be depicted in the visual depiction and not merely suggested.<sup>7</sup>

Child nudity is protected by the First Amendment.<sup>8</sup> It can be taboo,<sup>9</sup> risqué, or even child erotica.<sup>10</sup>

Child nudity is natural, ordinary, simple nudity without an action element.<sup>11</sup> Some sexual action elements that may transform simple nudity into lascivious exhibitions can include masturbation, intercourse, cunnilingus, fellatio, flagellation, fondling, golden showers, skatting, scissoring, and lewd poses among other sexual acts.<sup>12</sup>

The visual depictions you are evaluating do not become lascivious just because they ended up in Mr. Christiansen's hands or simply because they might have ended up in the hands of other pedophiles who are sexually excited

by them.<sup>13</sup> To be sure, Mr. Christianson did not produce the visual depictions you will be evaluating for indications of lasciviousness. The visual depictions you will be evaluating have been produced by some unknown individuals, all at various times and various places. There is no evidence that the producers of these visual depictions took these pictures for sexual pleasure or for a lascivious intent or purpose.

1. *U.S. v. Wiegand*, 812 F.2d 1239, 1244 (9 Cir 1987)
2. *U.S. v. Johnson*, 639 F.3d 433, 440 (8 Cir 2011) (observing a "picture is 'lascivious' only if it is sexual in nature."); *Ashcroft v. FSC*, 535 U.S. 234, 251 (2002) ("where the [pictures] [are] neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." (citing *Ferber v. New York*, 458 U.S. \_\_\_, 764-65 (1982)); *U.S. v. Stevens*, 559 U.S. 460, 471 (2010) (clarifying that *Child Porn* was categorically unprotected in *Ferber* because it involved visual depictions that were produced through sexual abuse of one or more children.); cf. Manual

2. Con't. *Enterprise Inc. v. Day*, 370 U.S. 478, 482-83 (1962) ("lewd and lascivious" have "always been taken as aimed at obnoxiously debasing portrayals of sex"); quoted with approval in *Osborne v. Ohio*, 495 U.S. 103, 119-20 (1990).
3. Quoting *U.S. v. Kemmerling*, 285 F.3d 644, 646 (8 Cir. 2002)
4. *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989)
5. *U.S. v. Amirault*, 173 F.3d 28 (1 Cir 1999) (citing to *Osborne*, 495 US at 113-14.)
6. Quoting generally *Osborne* 495 US. at 114 n.11 and 113 n.10 (the "graphic focus on the genitals" must be for a "prurient purpose[]." to be lascivious)
7. *U.S. v. Williams*, 553 U.S. 285, 297 (2008) ("Sexually explicit conduct" means "actual depiction of the sex act" and not "merely the suggestion that it is occurring.") (cite omitted); *Miller v. California*, 413 U.S. \_\_\_, 25 (1973)
8. "More nudity is protected by the First Amendment even where child pornography is involved" *Dalman v. Coleman*, 2012 U.S. Dist. Lexis 188303 (ND Ohio, May 30, 2012) (citing *Erznoznik v. Jack-Sonville*, 422 U.S. 205, 213 n.10 (1975) (images

8 con't. "must be, in some significant way, erotic");  
 U.S. v. Kemmerling, 285 F.3d 644, 646 (8 Cir 2002)  
 (Focuses on the pubic area, genitals or anus  
 must be "lewd" or "lurid" to be criminalized);  
 U.S. v. Villard, 885 F.2d 117, 124 (3d 1989) (law re-  
 quires more than mere nudity, phrase "exhib-  
 ition of the genitals or pubic area" in § 2256  
 (2) [A(v)] is qualified by the word "lascivious");  
 Ferber, 458 U.S. at 765 n. 18 ("nudity without more  
 is protected expression [...]"); Miller v. U.S., 940  
 F.3d 371, 376 (7 Cir 2019) (a defendant "can get to  
 trial on the view that [the images] lacked that  
 something more."); U.S. v. Russell, 662 F.3d  
 831, 843-844 (7 Cir 2011) ("Simple nudity" is not  
 criminal nudity); accord Falcom v. Hustler  
 Magazine, 607 F. Supp. 1341, — n.4 (ND Tx  
 1985)

9. U.S. v. Frabizic, 459 F.3d 80, 92 (1 Cir 2006)  
 (Torruella Concurring in Judgment; "the images  
 are jarring more because of the cultural  
 taboo regarding nude pictures of prepube-  
 scent girls than because of the specific por-  
 trayal of the girls.")

10. U.S. v. Vosburgh, 662 F.3d 512, 538 (3d Cir

10 Con't. 2010)(noting in Child porn prosecution that child erotica is legal); U.S. v. Gourde, 440 F.3d 1165, 1070 (9 Cir 2006)(recognizing Child erotica is "legal Content"); U.S. v. Edwards, 813 F.3d 953 (10 Cir 2015)(noting Child erotica is legal material); U.S. v. Scott, 901 F.3d 842, 844 (7 Cir 2018)(observing that the line between erotica and porn "is hazy."); U.S. v. Scanzoni, 392 F.Supp.3d 219, 224 (D. Mass, Aug 15 2019).

11. *Sovereign News v. Falke*, 448 F. Supp. 306, 395 and Fn. 333 (ND Ohio, Oct. 31, 1977)(Concluding "Simple nudity" is not the "hard core" Sexual Conduct prohibited and giving examples of the "action elements" at Fn. 333); accord *Eerber*, 458 U.S. at 773 (observing the New York Statute was "directed at the hard core of Child pornography") See, note 8 for mere nudity, *supra*.

12. *Falke*, 448 F. Supp. at Fn. 333.

13. Cf. *U.S. v. Williams*, 553 U.S. 285, 301 (2008) (holding § 2252A(a)(3)(B) which uses § 2256 (2)(A)'s definition of "Sexually explicit Conduct" cannot apply "[w]here the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes

13 Con't. that it constitutes a lascivious exhibition of the genitals") (internal quotation marks omitted); *U.S. v. Miller*, 829 F.3d 519, 526 n.3 (7 Cir 2016) ("The statute does not criminalize Sears Catalogs because they are in the hands of a pedophile."); *Williams*, 553 U.S. at 301 (innocuous pictures of naked children do not become lascivious because they end up in the hands of a pedophile who is sexually excited by them); *Falcone*, 607 F. Supp. at \_\_\_\_ (innocuous naked pictures of children do not become lascivious because they end up in *Hustler Magazine* or some other sex magazine); accord *U.S. v. Moon*, 13-cv-36-AR (CAAF 2014) ("possession of images for one's sexual gratification does not itself remove such images from First Amendment protection" otherwise a "sexual deviant's quirks could turn a Sears catalog into pornography."); *U.S. v. Amirault*, 173 F.3d 28, 34 (1 Cir 1999) (Transporters sexualized "subjective reaction" to legal images is unacceptable.)



## L. Sexually Explicit Conduct

"Sexually explicit Conduct" means actual Sexual intercourse, including genital-genital, or oral-genital, whether between persons of the same or opposite sex; or lascivious exhibition of the genitals or pubic area of any person.



## M. Child Erotica

"Child erotica" portrays something less than sexually explicit conduct<sup>1</sup> and may be sexually arousing to a given individual such as a pedophile or a hebophile.<sup>2</sup> Child erotica is legal content.<sup>3</sup>

1. *U.S. v. Padilla*, 2017 CCA LEXIS 629 (CCA Sept 29, 2017) ("[C]hild erotica portrays something less than sexually explicit conduct")
2. *U.S. v. Martin*, 426 F.3d 68, 79 (2d Cir 2005) (images of children that are not sexually explicit but that may be "sexually arousing to a given individual such as a pedophile"); cf. *U.S. v. Scott*, 901 F.3d 842, 844 (7 Cir 2018) (declaring the "line between the two is hazy.")
3. *U.S. v. Vosburgh*, 602 F.3d 512, 538 (3d Cir 2010) (noting erotica is legal material), accord *U.S. v. Gourde*, 440 F.3d 1065, 1070 (9 Cir 2006); *U.S. v. Edwards*, 813 F.3d 953 (10 Cir 2015); See also *U.S. v. Scanzani*, 392 F.Supp.3d 210, 224 (D. Mass 2019) (erotica "produces sexual desire and pleasure")

## N. Difficulties In Applying Instructions

That, when, in cases under this law, doubts and uncertainties arise as to the meaning and intentions of the words objected to, or in construing them with the context, or if there are difficulties in applying the definitions given by the Court, all reasonable doubts, uncertainties, and difficulties are to be resolved by giving the defendant the benefit of them.

U.S. v. Bennet, 24 F. Cas. 1093 (S.D. NY 1879) (Inst No. 10)

N.

Minor

The term "minor" means any actual living person under the age of 18 years.

O.

## Two Conclusions

The Jury must find the defendant innocent if it views the evidence in the case as reasonably permitting either of two conclusions - one of innocence and the other of guilt

U.S. v. Braxton, 877 F.2d 556 (7 Cir 1989)

P.

## Silvern Instruction

Seventh Circuit Pattern Inst. § 7.03

U.S. v. Silvern, 484 F.2d 879 (7 Cir 1973)

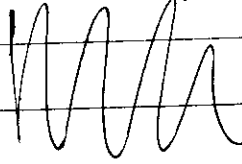
## E. Proof Beyond Reasonable Doubt

Defendant requests a proof beyond Reasonable doubt instruction instructing the jury regarding its solemn duty to acquit in the absence of proof beyond a reasonable doubt.

The Due process clause of the Fourteenth Amendment to the U.S. Const. guarantees that a defendant shall only be convicted upon proof beyond a reasonable doubt. In *Re Winship*, 397 U.S. 358, 361-364 (1970). The Reasonable doubt standard of proof is an essential component in every criminal proceeding. In *Re Winship*, 397 U.S. at 361-364.

Its inclusion in the Court's charge is indispensable. *Jackson v. Virginia*, 443 U.S. 307, 320 n.14, reh. denied 444 U.S. 890 (1979).

Respectfully,



Michael Christianson

513110 JCDC

3050 S. Justice Way

3080

Kankakee, IL 60901

### Certificate

I certify that on May 28, 2021, I placed the foregoing in the JCDC Institutional legal mail system with sufficient first class postage affixed and addressed to:

Clerk of Court

Federal Dist. Court

Suite 2300

5400 Federal Plaza

Hammond, IN 46320

